

NO. SC84078

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**SUPREME COURT OF MISSOURI**

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**STATE OF MISSOURI,**

**Respondent,**

**v.**

**REGINALD WESTFALL,**

**Appellant.**

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**APPEAL FROM THE CIRCUIT COURT OF THE CITY OF ST. LOUIS  
TWENTY-SECOND JUDICIAL CIRCUIT, DIVISION 19  
THE HONORABLE TIMOTHY J. WILSON, JUDGE**

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**RESPONDENT'S STATEMENT, BRIEF AND ARGUMENT**

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## **JURISDICTIONAL STATEMENT**

This appeal is from the appellant's convictions for one count of assault in the first degree, § 565.050, RSMo 2000, one count of armed criminal action, § 571.015, RSMo 2000, one count of property damage in the second degree, § 569.120, RSMo 2000, and one count of assault in the third degree, § 565.070, RSMo 2000, in the Circuit Court of the City of St. Louis. The appellant was sentenced to concurrent terms of twenty years of imprisonment in the Missouri Department of Corrections for assault in the first degree and armed criminal action. He was also sentenced to term of imprisonment for property damage and assault in the third degree and was given credit for time served. After opinion by the Missouri Court of Appeals, Eastern District, this Court granted transfer pursuant to Supreme Court Rule 83.04. Therefore, jurisdiction lies in this Court. Article V, § 10, Missouri Constitution (as amended 1982).

### **STATEMENT OF FACTS**

The appellant, Reginald Westfall, was charged as a prior and persistent offender with one count of assault in the first degree, § 565.050, RSMo 2000, one count of armed criminal action, § 571.015, RSMo 2000, one count of unlawful use of a weapon, § 571.030, RSMo 2000, one count of property damage in the second degree, § 569.120, RSMo 2000, and six counts of assault in the third degree, § 565.070, RSMo 2000 (L.F. 11-14). The cause proceeded to trial in the Circuit Court of the City of St. Louis, the Honorable Timothy J. Wilson presiding (Tr. 1:2).<sup>1</sup>

The appellant does not dispute the sufficiency of the evidence to sustain his convictions. Viewed in the light most favorable to the judgment, the following evidence was adduced at trial: The appellant and Tracie Westfall got married on May 15, 1994 (Tr. 1:187-88, 192). They had four children (Tr. 1:188-89). Sometime in 1996, the appellant and Tracie experienced a physical separation (Tr. 1:189). During this

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<sup>1</sup> Citations to the transcript will be as follows: volume 1 (Tr. 1: pg. #), volume 2 (Tr. 2: pg. #), and sentencing (Tr. S: pg. #).

separation, Tracie met and began dating Robert Jenkins (Tr. 1:189). This relationship lasted until sometime in 1997 or 1998 when the appellant returned to the home following the separation (Tr. 1:189-90). The appellant was aware of the relationship that had existed between Tracie and Jenkins during his separation from his wife (Tr. 1:190).

On June 16, 1998, following his return to the home, the appellant and Tracie began to argue about her relationship with Jenkins (Tr. 1:192). During this argument, the appellant became physical and started to choke Tracie by grabbing her around the neck (Tr. 1:193). Eventually, the appellant stopped choking Tracie and she attempted to call the police (Tr. 1:195). Before she could do so, however, the appellant grabbed the phone away from her and hit her across the face with the receiver (Tr. 1:195). Tracie was ultimately able to call the police to report the incident the next day (Tr. 1:195). Due to this incident, the appellant was charged with one count of assault in the third degree (Count X of the information) (L.F. 14).

Thereafter, on October 8, 1998, the appellant called the police to report that someone was throwing rocks at the windows of the house he shared with Tracie (Tr. 1:200). The police responded to the scene but did not find anything amiss (Tr. 1:200). After the police left, the appellant and Tracie again began to argue about her relationship with Jenkins and this argument again became physical (Tr. 1:200-01). During this argument, the appellant picked Tracie up out of a chair and dropped her back down causing her to hit her head on a window sill (Tr. 1:201). The police were then called to the house for the second time (Tr. 1:201). The appellant ultimately left the house late that night (Tr. 1:201).

Later that night, Tracie was on the phone with her sister when she heard some unusual clicking sounds (Tr. 1:202-03). She told her sister that she had paged Jenkins and then heard the appellant on the line saying "Oh, you did, huh" (Tr. 1:203-04). The appellant had taken a cordless phone with him when

he left the house and was able to break into this conversation when he returned to the house, parked outside, and turned the phone on (Tr. 2:45). After she heard the appellant on the line, Tracie heard glass breaking at the front door (Tr. 1:204). Tracie then immediately ran out the back of the house and up an alley to get to a telephone to call for help (Tr. 1:205). As she was running up the alley, she encountered Michael and Audrey Tatum standing in their garage (Tr. 205-07). She asked them for help and then noticed the appellant driving down the alley toward the garage (Tr. 1:206-07). The Tatums pulled Tracie into the garage and closed the door (Tr. 1:207). Immediately thereafter, the appellant rammed his car into the garage door (Tr. 1:208).

Tracie and the Tatums then ran from the garage around to the front of their house (Tr. 1:208). The appellant also drove around to the front of the house and got out of the car (Tr. 1:209). He had a phone in one hand and what Tracie believed to be a knife in the other (Tr. 1:208). The appellant grabbed Tracie and dragged her almost to the car (Tr. 1:209). He then got back into the car alone and drove away (Tr. 1:210). Due to the events occurring in the late night hours of October 8 and the early morning hours of October 9, 1998, the appellant was charged with five counts of assault in the third degree, one count of unlawful use of a weapon, and one count of property damage in the second degree (Counts III through IX of the information) (L.F. 12-13).

Subsequently, in late January 1999, the appellant and Tracie again argued about her relationship with Jenkins (Tr. 1:228). After this argument, Tracie left the appellant, took the children, and went to stay with Jenkins (Tr. 1:229). On February 2, 1999, Tracie and Jenkins took the children to school and dropped off the two boys first (Tr. 1:230-31). They then did a little shopping before taking one of her daughters to school at St. Pius (Tr. 1:231). When they arrived at St. Pius, Tracie took her daughter inside

and Jenkins stayed in the car with the remaining child (Tr. 1:232).

While waiting for Tracie to come back out, Jenkins leaned over into the back seat of the car and gave the child some food (Tr. 1:399-400). He then heard the car door open and believed that Tracie was getting into the car (Tr. 1:400-01). When he looked up, however, he realized that it was the appellant (Tr. 1:401). The appellant said “I’m going to teach you about messing with my wife” (Tr. 1:401). The appellant then immediately began cutting Jenkins on his face and neck (Tr. 1:402, 406-07). As he was being cut, Jenkins’s foot came off of the brake, and the car started to roll (Tr. 1:402). The car rolled through a fence and hit a wall (Tr. 1:403). Jenkins then got out of the car and ran for help (Tr. 1:403-04). The appellant got in the driver’s seat of the car and drove off (Tr. 1:405, 428). During the attack, Jenkins sustained five cuts to his nose, right cheek, chin, neck and ear (Tr. 1:406-07). Although the cuts were superficial, Jenkins experienced soreness for approximately two weeks after the incident, had difficulty chewing and turning his head for approximately a week, and was left with several permanent scars (Tr. 1:411-12). As a result of this incident, the appellant was charged with one count of assault in the first degree and one count of armed criminal action (Counts I and II of the information).

The appellant testified in his own behalf at trial (Tr. 2:19). With regards to the incident on February 2, 1999, he testified that he was walking up to St. Pius to see his daughter when he noticed Tracie’s car sitting out front (Tr. 2:23-24). He did not see anyone in the car and decided to get in and wait for Tracie to come out (Tr. 2:24). When he got in the car, however, he saw Jenkins sitting in the driver’s seat leaned over looking down on the floor of the passenger side (Tr. 2:25). He then told Jenkins to get out of the car, but Jenkins started to hit him (Tr. 2:25-26). The appellant also testified that after Jenkins began beating him, the car started moving and eventually hit a wall (Tr. 2:26-27). He then grabbed a utility knife from his

pocket and started cutting Jenkins in an attempt to stop the beating (Tr. 2:29-30). The appellant then testified that Jenkins got out of the car and ran off (Tr. 2:30-31). The appellant got into the driver's seat and left (Tr. 2:30-31).

With regards to the incidents of October 8 and 9, 1998, the appellant testified that he left the house after having an argument with Tracie (Tr. 2:40-42). He later returned to the house and overheard the conversation between Tracie and her sister (Tr. 2:45-46). He then told Tracie that they needed to talk and walked up to the house (Tr. 2:46). He saw Tracie run out the back door and decided to pursue her because he believed that the neighborhood was not safe (Tr. 2:47-48). As he followed her down the alley, he saw her get pulled into a garage and became concerned (Tr. 2:49-50). As he was looking for her, he accidentally rammed into the Tatums' garage door (Tr. 2:50-51). He then proceeded to the front of the house and asked Tracie to leave with him, but she refused, so he left (Tr. 2:51-53). The appellant denied that he had a weapon at this time, denied intentionally ramming the Tatums' garage door, and denied that he had gotten physical with Tracie at any time during this incident (Tr. 2:41, 50, 52).

With regards to the June 16, 1998, incident, the appellant testified that Tracie had left the house on the prior Thursday and had bruises and abrasions when she returned on Sunday afternoon (Tr. 2:55). He denied knowing how she had gotten the bruises or that he had done anything to cause them (Tr. 2:55).

At the close of the evidence, instructions, and argument of counsel, the jury returned its verdicts finding the appellant guilty of assault in the first degree and armed criminal action as a result of the incidents on February 2, 1999, guilty of property damage in the second degree as a result of ramming the Tatums' garage door, and guilty of assault in the third degree as a result of the incident on June 16, 1998 (Counts I, II, VI, and X) (Tr. 2: 168). The jury acquitted the appellant of the remaining charges. As such, the trial

court entered its judgment convicting the appellant of the above crimes and sentencing him to twenty years of imprisonment for assault in the first degree and twenty years of imprisonment for armed criminal action, the sentences to be served concurrently (Tr. S:26-27). As to the remaining counts, the trial court sentenced the appellant to six months of imprisonment but gave him credit for time served (Tr. S:27, L.F. 165).

The appellant subsequently appealed his convictions and sentences to the Missouri Court of Appeals, Eastern District, which affirmed them on September 4, 2001. Thereafter, the appellant sought and this Court granted transfer. This appeal follows.

## **ARGUMENT**

### **I.**

**THE TRIAL COURT DID NOT ERR IN REFUSING TO SUBMIT TO THE JURY THE APPELLANT'S PROFFERED INSTRUCTION Z WHICH AUTHORIZED A FINDING OF SELF-DEFENSE BASED ON THE USE OF NON-DEADLY FORCE AS WELL AS DEADLY FORCE, WHICH WAS SUBMITTED, BECAUSE THE SUBMISSION OF THIS INSTRUCTION WAS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE IN THAT THE EVIDENCE PRESENTED AT TRIAL ESTABLISHED THAT THE APPELLANT INTENTIONALLY USED A KNIFE TO CUT JENKINS IN THE FACE AND THROAT KNOWING THAT TO DO SO CREATED A SUBSTANTIAL RISK OF DEATH OR SERIOUS PHYSICAL INJURY TO JENKINS.**

In his first point on appeal, the appellant claims that the trial court erred both in refusing his proffered instruction on self-defense, Instruction Z, and in submitting Instruction 20 to the jury instead (App.

Sub. Br. 18). Specifically, he claims that the instruction submitted by the trial court was improper as it instructed the jury only on the use of deadly force in self-defense even though the evidence presented at trial created an issue of fact as to whether he used deadly or non-deadly force (App. Sub. Br. 18).

At trial, the appellant's theory of defense with regard to the charges of assault in the first degree and armed criminal action arising out of his altercation with Robert Jenkins was that he had cut Jenkins only in an attempt to stop Jenkins from hitting him (Tr. 179-80). As such, he proffered Instruction Z, an instruction on self-defense, to the trial court for submission to the jury. Instruction Z read as follows:

#### **PART A-GENERAL INSTRUCTIONS**

One of the issues as to Count I is whether the use of force by the defendant against Robert Jenkins was in self-defense. In this state, the use of force including the use of deadly force to protect oneself from harm is lawful in certain situations.

A person can lawfully use force to protect himself against an unlawful attack. However, an initial aggressor, that is, one who first attacks or threatens to attack another, is not justified in using force to protect himself from the counter-attack which he provoked.

In order for a person lawfully to use force in self-defense, he must reasonably believe he is in imminent danger of harm from the other person. He need not be in actual danger but he must have a reasonable belief that he is in such danger.

If he has such a belief, he is then permitted to use that amount of force which he reasonably believes to be necessary to protect himself.

But a person is not permitted to use deadly force, that is, force which he knows will create a substantial risk of causing death or serious physical injury, unless he reasonably

believes he is in imminent danger of death or serious physical injury.

And, even then, a person may use deadly force only if he reasonably believes the use of such force is necessary to protect himself.

As used in this instruction, the term “reasonable belief” means a belief based on reasonable grounds, that is, grounds which could lead a reasonable person in the same situation to the same belief. This depends upon how the facts reasonably appeared. It does not depend upon whether the belief turned out to be true or false.

## **PART B-SPECIFIC INSTRUCTIONS**

On the issue of self-defense as to Count I, you are instructed as follows:

*If the defendant reasonably believed he was in imminent danger of harm from the acts of Robert Jenkins and he used only such non-deadly force as reasonably appeared to him to be necessary to defend himself, then he acted in lawful self-defense, or if the defendant reasonably believed he was in imminent danger of death or serious physical injury from the acts of Robert Jenkins and he reasonably believed that the use of deadly force was necessary to defend himself, then his use of deadly force was in lawful self-defense.*

The state has the burden of proving beyond a reasonable doubt that the defendant did not act in lawful self-defense. Unless you find beyond a reasonable doubt that the defendant did not act in lawful self-defense, you must find the defendant not guilty under Count I.

As used in this instruction, the term “serious physical injury” means physical injury

that creates a substantial risk of death or that causes serious disfigurement or protracted loss or impairment of the function of any part of the body.

## **PART C-SPECIAL MATTERS**

Evidence has been introduced of the prior relationship between defendant and Robert Jenkins including evidence of acts of violence. You may consider this evidence in determining who was the initial aggressor in the encounter and you may also consider it in determining whether the defendant reasonably believed he was in imminent danger of harm from Robert Jenkins.

Evidence has been introduced of threats made by defendant against Robert Jenkins. You may consider this evidence in determining who was the initial aggressor in the encounter.

You, however, should consider all of the evidence in the case in determining whether the defendant acted in lawful self-defense.

(L.F. 133-34). The trial court rejected this instruction.

Instead, the trial court submitted Instruction 20 which omitted the language italicized above regarding the use of non-deadly force. That instruction provided as follows:

## **PART A-GENERAL INSTRUCTIONS**

One of the issues as to Count I is whether the use of force by the defendant against Robert Jenkins was in self-defense. In this state, the use of force including the use of deadly force to protect oneself from harm is lawful in certain situations.

A person can lawfully use force to protect himself against an unlawful attack.

However, an initial aggressor, that is, one who first attacks or threatens to attack another, is not justified in using force to protect himself from the counter-attack which he provoked.

In order for a person lawfully to use force in self-defense, he must reasonably believe he is in imminent danger of harm from the other person. He need not be in actual danger but he must have a reasonable belief that he is in such danger.

If he has such a belief, he is then permitted to use that amount of force which he reasonably believes to be necessary to protect himself.

But a person is not permitted to use deadly force, that is, force which he knows will create a substantial risk of causing death or serious physical injury, unless he reasonably believes he is in imminent danger of death or serious physical injury.

And, even then, a person may use deadly force only if he reasonably believes the use of such force is necessary to protect himself

As used in this instruction, the term “reasonable belief” means a belief based on reasonable grounds, that is, grounds which could lead a reasonable person in the same situation to the same belief. This depends upon how the facts reasonably appeared. It does not depend on whether the belief turned out to be true or false.

## **PART B-SPECIFIC INSTRUCTIONS**

On the issue of self-defense as to Count I, you are instructed as follows:

If the defendant was not the initial aggressor in the encounter with Robert Jenkins, and if the defendant reasonably believed he was in imminent danger of death or serious physical injury from the acts of Robert Jenkins and he reasonably believed that the use of

deadly force was necessary to defend himself, then he acted in lawful self-defense.

The state has the burden of proving beyond a reasonable doubt that the defendant did not act in lawful self-defense. Unless you find beyond a reasonable doubt that the defendant did not act in lawful self-defense, you must find the defendant not guilty under Count I.

As used in this instruction, the term “serious physical injury” means physical injury that creates a substantial risk of death or that causes serious disfigurement or protracted loss or impairment of the function of any part of the body.

#### **PART C-SPECIAL MATTERS**

Evidence has been introduced of the prior relationship between defendant and Robert Jenkins including evidence of acts of violence. You may consider this evidence in determining who was the initial aggressor in the encounter and you may also consider it in determining whether the defendant reasonably believed he was in imminent danger of harm from Robert Jenkins.

Evidence has been introduced of threats made by defendant against Robert Jenkins. You may consider this evidence in determining who was the initial aggressor in the encounter.

You, however, should consider all of the evidence in the case in determining whether the defendant acted in lawful self-defense.

(L.F. 92-93).

In claiming that the trial court improperly instructed the jury, the appellant argues that the evidence

at trial presented a factual question as to whether he used only non-deadly force to protect himself from an alleged attack by Jenkins or whether he resorted to deadly force in the reasonable belief that it was necessary to do so to avoid death or serious physical injury (App. Sub. Br. 18). Thus, he argues that the court should have submitted his proffered instruction on self-defense which precisely tracked the mandatory language of MAI-CR3d 306.06, Part B, Specific Instructions, Paragraph D, and which is to be used where the evidence presents a question of whether the defendant used deadly or non-deadly force and where the evidence supports the lawful use of deadly force (App. Sub. Br. 20-22). The appellant argues that his instruction, rather than Instruction 20 which authorized a finding of self-defense only upon the greater showing required to justify the use of deadly force, was the appropriate instruction to be given based on the evidence presented at trial (App. Br. 18-19).

When reviewing whether a defendant was entitled to a particular instruction, this court should review the evidence in the light most favorable to the defendant. State v. Edwards, 980 S.W.2d 75, 76 (Mo. App. E.D. 1998). An appellate court may not reverse a conviction based on an alleged instructional error, however, unless there is, in fact, error in the instructions submitted and prejudice to the defendant. State v. Hirt, 16 S.W.3d 628, 632 (Mo. App. W.D. 2000).

#### A. The Appellant's Proffered Instruction Was Properly Refused

##### As It Was Not In Proper Form

It is well settled that a trial court may properly refuse a proffered instruction where that instruction is not in proper form. State v. Parkhurst, 845 S.W.2d 31, 37 (Mo. banc 1992). This is because a trial court is not obligated to give an instruction which is not meticulously correct. State v. Derenzy, No. WD58952, slip op. at 8 (Mo. App. W.D. December 11, 2001); see also State v. Binnington, 978 S.W.2d

774, 776 (Mo. App. E.D. 1998). This is true even where, as here, the deficiency in the proffered instruction was not the basis for the trial court's refusal to submit such instruction. Derenzy, slip op. at 7-8. A deficiency in a proffered instruction is alone sufficient to justify the refusal of that instruction. State v. McCullum, No. SD 23920, slip op. at 12 (Mo. App. S.D. October 31, 2001).

A review of the self-defense instruction submitted by the appellant in this case reveals that it was not in proper form. Instruction Z, as submitted by the appellant, contained initial aggressor language in the second paragraph of Part A (L.F. 133). However, the requisite initial aggressor language was not included in the first paragraph under Part B (L.F. 133). As such, the self-defense instruction submitted by the appellant was internally inconsistent, did not comply with the Notes on Use to MAI-CR3d 306.06, and was not in proper form. Because this instruction was not meticulously correct, the trial court committed no error in refusing to submit it to the jury. Parkhurst, 845 S.W.2d at 37; Derenzy, slip op. at 8; Binnington, 978 S.W.2d at 776.

#### B. The Appellant's Proffered Instruction Was Properly Refused

##### As There Was No Evidence That The Appellant Used Only Non-Deadly Force

Even assuming, *arguendo*, that the trial court was not justified in refusing Instruction Z based solely on the deficiency in form, the appellant is still not entitled to relief on this claim. This is because the evidence presented at trial simply created no issue of fact as to whether the appellant used deadly or non-deadly force.

In arguing that he was entitled to submission of Instruction Z, which included language regarding the use of only non-deadly force, the appellant claims that the evidence presented at trial raised a fact question as to whether he used deadly or non-deadly force against Jenkins even while supporting a finding

that any use of deadly force was lawful (App. Sub. Br. 18). Specifically, he argues that he testified at trial that he was dazed by the beating inflicted upon him by Jenkins before he drew the knife (App. Sub. Br. 26). He further testified that as Jenkins began to hit him with what felt like a hard object, he grabbed the knife from his pocket and cut Jenkins with it (App. Sub. Br. 25). He also argues that the doctor who treated Jenkins after the incident testified that his injuries were superficial and were not deep, serious, or life threatening (App. Sub. Br. 26). The appellant claims that this testimony supported a finding that he did not act with the purpose to cause death or serious physical injury and did not wield the knife in a manner that created a substantial risk of death or serious physical injury (App. Sub. Br. 26). As such, he claims that this evidence showed he used only non-deadly force against Jenkins (App. Sub. Br. 26).

The appellant further claims that the evidence also supported a finding that any use of deadly force by him against Jenkins was lawful (App. Sub. Br. 26-27). In making this claim, he argues that the jury could have believed that the knife he used to cut Jenkins was of such character that it would have created a substantial risk of serious physical injury (App. Sub. Br. 26). He further argues that the evidence established that he believed that Jenkins had grabbed a hard object as he beat him and that he feared serious physical injury as a result of Jenkins's alleged prior assault against him (App. Sub. Br. 26-27). Thus, he claims that the evidence established that he had a reasonable basis to conclude that the use of deadly force was necessary to avoid suffering serious physical injury or death (App. Sub. Br. 27).

Generally, a defendant is entitled to a jury instruction on any theory which the evidence tends to establish. State v. Arbuckle, 816 S.W.2d 932, 935 (Mo. App. S.D. 1991). To be submitted to the jury, however, an instruction must be based upon substantial evidence and the reasonable inferences drawn therefrom. State v. Wilhelm, 774 S.W.2d 512, 517 (Mo. App. W.D. 1989). In determining whether an

instruction is supported by substantial evidence, the trial court must consider the evidence presented at trial and all inferences that logically flow therefrom. Arbuckle, 816 S.W.2d at 935.

As the appellant correctly notes, the pattern jury instruction on self-defense, MAI-CR3d 306.06, does include a paragraph submitting the issue of whether the defendant used deadly or non-deadly force in defending himself. In this respect, the pattern instruction provides that paragraph 2[D] under Part B is to be used when there is some evidence that the defendant used deadly force and it is an issue in the case whether the defendant used deadly force and there is also evidence supporting the lawful use of deadly force. MAI-CR3d 306.06, Part B, Paragraph 2[D]. This language, however, is to be used only where there is an issue as to whether the defendant used deadly force.

In the instant case, contrary to the appellant's assertions on appeal, the evidence presented at trial clearly established that the appellant did, in fact, use deadly force against Jenkins. Deadly force is defined as physical force which the actor uses with the purpose of causing or which he knows to create a substantial risk of causing death or serious physical injury. § 563.011(1), RSMo 2000. Serious physical injury is defined as physical injury that creates a substantial risk of death or that causes serious disfigurement or protracted loss or impairment of the function of any part of the body. § 556.061(28), RSMo 2000. Disfigurement means to deface or mar the appearance of someone. State v. Bledsoe, 920 S.W.2d 538, 540 (Mo. App. E.D. 1996). The visibility and length of any scarring is relevant in determining whether disfigurement is serious. Id.

Here, the evidence presented at trial established that the appellant took a knife and disfigured Jenkins by repeatedly slashing him across the face and neck causing cuts that resulted in permanent scars (Tr. 2:29, 1:371-72, 402-07). Although the injuries actually suffered were described as superficial by the

doctor who treated Jenkins after the incident (Tr. 1:372), the doctor also testified that the injury to Jenkins's neck was potentially life threatening due to the possibility of damage to the carotid artery and other vessels in the neck (Tr. 1:378). Moreover, the evidence established that as a result of the appellant's actions, Jenkins suffered serious disfigurement as he was left with a one and a half centimeter scar on his nose, a five centimeter scar on his cheek, an eight centimeter scar from his ear down to his jaw, two scars on his ear, and a seven centimeter scar across the middle of his neck (Tr. 1:371, 381). Jenkins also had a sebaceous cyst, skin caught in a laceration that continues to produce skin, in the laceration on his jaw (Tr. 1:381). These disfiguring scars were easily visible and permanent (Tr. 1:381-82).

The injuries suffered by the victim here were akin to, if not more serious than, those suffered by the victims in Bledsoe, 920 S.W.2d at 540. In Bledsoe, the defendant cut two people with a broken beer bottle. Id. at 539. One of the victims suffered lacerations to his lip, chin, neck and ear. Id. at 540. These injuries left him with a four centimeter scar under his chin as well as a broken front tooth. Id. The other victim suffered multiple facial lacerations and puncture wounds. Id. She was also left with a one and a half inch scar on her chin as well as scars on her lip and between her eyes. Id. On those facts, the Court of Appeals concluded that the victims suffered serious disfigurement and, therefore, serious physical injury. Id. Thus, it is clear that the injuries suffered by the victim in the instant case also rose to the level of serious disfigurement and serious physical injury. Id.; see also § 556.061(28), RSMo 2000.

Further, the appellant testified at trial that he intentionally reached into his pocket to obtain a weapon to use in an attempt to get Jenkins off of him (Tr. 2:29). He pulled out a utility knife, pushed a button to make the blade come up, brought the knife up, and used that knife to cut Jenkins (Tr. 2:29, 82). This evidence established that the appellant intended to lash out with the knife in the very manner in which

he did and that his use of the knife in that manner constituted the use of deadly force. See State v. Albanese, 920 S.W.2d 917, 925 (Mo. App. W.D. 1996), overruled on other grounds by State v. Beeler, 12 S.W.3d 294, 298-99 (Mo. banc 2000); State v. Powers, 913 S.W.2d 138, 141 (Mo. App. W.D. 1996); State v. Huffman, 711 S.W.2d 192, 194 (Mo. App. E.D. 1986).

This is especially true where, as here, the appellant did not lash out wildly with the knife but directed his blows to Jenkins's face and throat. In so doing, the appellant must have known that he was creating a substantial risk of death or serious physical injury to Jenkins. See Albanese, 920 S.W.2d at 921-22, 925; State v. Moseley, 705 S.W.2d 613, 618 (Mo. App. E.D. 1986). Thus, rather than presenting an issue as to whether the appellant used deadly or non-deadly force, this evidence clearly established that the appellant used deadly force in allegedly defending himself from Jenkins's attack.

Because the evidence presented at trial here clearly established that the appellant used deadly force against Jenkins, the trial court did not err in refusing Instruction Z as proffered by the appellant and in giving Instruction 20 which submitted only the issue of the use of deadly force. As such, the appellant was not entitled to relief on this claim, and his first point on appeal must fail.

## II.

**THE TRIAL COURT DID NOT ERR IN REFUSING TO CONDUCT A HEARING ON THE APPELLANT'S SUPPLEMENTAL MOTION FOR NEW TRIAL WHEREIN HE ALLEGED THAT HE HAD NEWLY DISCOVERED EVIDENCE ENTITLING HIM TO A NEW TRIAL BECAUSE THE APPELLANT'S MOTION WAS NOT TIMELY FILED, THE APPELLANT FAILED TO OFFER ANY PROOF IN SUPPORT OF HIS MOTION, AND THE ALLEGEDLY NEW EVIDENCE WOULD NOT HAVE REFUTED THE STATE'S EVIDENCE IN SUPPORT OF CONVICTION BUT WOULD HAVE MERELY IMPEACHED THE CREDIBILITY OF A STATE'S WITNESS.**

In his second point on appeal, the appellant claims that the trial court erred in failing to conduct a hearing on a claim of newly discovered evidence raised in an untimely *pro se* "Supplemental Motion for New Trial" (App. Br. 24, 26). In making this claim, he argues that the newly discovered evidence would have revealed that Jenkins committed perjury in his trial testimony and that Tracie committed perjury in her pre-trial deposition testimony when they both denied that Jenkins had hit him with a jack handle on June 26, 1998 (App. Br. 24). He further argues that the late discovery of the evidence was not due to a lack of diligence, that the evidence was not merely cumulative or impeaching, and that there was a reasonable probability that the evidence would have led to a different result at trial (App. Br. 24).

Supreme Court Rule 29.11(b) requires that a motion for new trial be filed within fifteen days after the return of the jury's verdict. The rule also provides that this time limit may be extended by the trial court for one additional period not to exceed ten days. Here, the verdicts against the appellant were returned on March 9, 2000 (L.F. 122-23). The trial court granted the appellant the additional ten days to file his motion

for new trial (Tr. 2:170), making the appellant's motion due on April 3, 2000. The appellant did not file his motion asserting his claim of newly discovered evidence, however, until April 20, 2000 (L.F. 152). As such, the motion was untimely.

It is well settled that a claim that a defendant is entitled to a new trial based on newly discovered evidence must be made in a timely filed motion for new trial. State v. Skillicorn, 944 S.W.2d 877, 896 (Mo. banc), *cert. denied* 522 U.S. 999 (1997). An untimely motion containing allegations of newly discovered evidence is a nullity. State v. Young, 943 S.W.2d 794, 799 (Mo. App. W.D. 1997). In addressing a claim of newly discovered evidence, the Missouri Supreme Court stated, “[o]nce the time within which to file a motion for new trial has expired, a remedy no longer lies through direct appeal.” Skillicorn, 944 S.W.2d at 896. “The only formally authorized means by which a criminal defendant with a late motion can seek relief based on newly-discovered evidence is by application to the governor for executive clemency or pardon pursuant to Mo. Const. art. IV §7 (1945).” Young, 943 S.W.2d at 799. “Clemency is deeply rooted in our Anglo-American tradition of law, and is the historic remedy for preventing miscarriages of justice where judicial process has been exhausted.” Hererra v. Collins, 506 U.S. 390, 113 S.Ct. 853, 865 n. 8, 122 L.Ed.2d 203 (1993). Because the appellant's allegation of newly discovered evidence here was not raised in a timely fashion, his supplemental for new trial was a nullity. Thus, this court should decline to review the appellant's claim.

The respondent recognizes that in State v. Mooney, 670 S.W.2d 510, 515 (Mo. App. E.D. 1984), the Court of Appeals, Eastern District, did grant a motion to remand after the deadline for filing a motion for a new trial had passed on the ground of newly discovered evidence. However, Mooney is no longer valid as it was decided prior to this court's decision in Skillicorn which clearly held that a remedy no longer

lies through direct appeal for claims of newly discovered evidence raised after the time for filing a motion for new trial has expired. Skillicorn, 944 S.W.2d at 896.

Even assuming, *arguendo*, that Mooney is still valid, it is distinguishable from the instant case. In Mooney, a child abuse victim with a history of mental illness told someone that he had lied at trial and made up the story about being abused. Mooney, 670 S.W.2d at 511-12. The person to whom he made this statement tape-recorded the statement and turned it over to Mooney's attorney. Id. at 512. Mooney's attorney then filed various motions to bring this statement to the attention of the Court of Appeals.

In determining that Mooney was entitled to a remand to the trial court so that he could move for a new trial based on the newly discovered evidence, the Court of Appeals noted that the victim's testimony had been the *only* evidence presented at trial to support Mooney's conviction and had been uncorroborated by any other evidence. Id. at 511, 515. The court also noted that the circumstances under which the recantation of the trial testimony had taken place were reasonably free from suspicion of undue influence or pressure from any source. Id. at 516. In sum, the newly discovered evidence alleged in Mooney totally refuted the State's evidence of guilt.

Such is not the case here. In this case, the victim's testimony was not the only evidence offered in support of the appellant's convictions. Rather, several witnesses testified as to the events which led to the appellant's convictions and their testimony was corroborated by other physical evidence. Moreover, the appellant himself admitted that he had cut the appellant about the face and neck. His defense was not that he had not committed the charged acts but that he had done so only in self-defense. As such, the newly discovered evidence alleged by the appellant did not refute the totality of the evidence presented by the State to establish his guilt. For this reason, even if Mooney, is still valid, it should be limited to its unique

facts. State v. Suter, 931 S.W.2d 856, 865 (Mo. App. W.D. 1996); State v. Hill, 884 S.W.2d 69, 75-76 (Mo. App. S.D. 1994); State v. Westcott, 857 S.W.2d 393, 397-398 (Mo. App. W.D. 1993).

In any event, the appellant would not be entitled to relief on his claim of newly discovered evidence even if his motion had been timely filed. This is because new trials based on claims of newly discovered evidence are generally disfavored. State v. Magee, 911 S.W.2d 307, 312 (Mo. App. W.D. 1995). To be entitled to a new trial based on the discovery of new evidence, a defendant must show that: (1) the evidence has come to the knowledge of the defendant since the trial; (2) it was not owing to want of due diligence that it was not discovered sooner; (3) the evidence is so material that it would probably produce a different result at a new trial; and (4) it is not cumulative and does not merely impeach the credibility of a witness. State v. Whitfield, 939 S.W.2d 361, 367 (Mo. banc), *cert. denied* 522 U.S. 831 (1997).

A motion for new trial alleging newly discovered evidence must also be accompanied by proof, either in the motion itself or by affidavits. State v. Davis, 698 S.W.2d 600, 602 (Mo. App. E.D. 1985).

Here, the newly discovered evidence put forth by the appellant consisted of a letter he allegedly received after his trial from his then wife Tracie (L.F. 152-53). In this letter, Tracie allegedly asserted that she had seen Jenkins hit the appellant with a jack handle during an altercation on June 26, 1998 (L.F. 154). The appellant contends that this was contrary to what she told the police at the time of the incident and contrary to testimony she gave in a pre-trial deposition (App. Br. 25). At trial, Tracie was not asked by either the appellant or the State about the June 26, 1998, incident (Tr. 1:187-282). The appellant also contends that this letter established that Jenkins committed perjury when he testified at trial that he had not hit the appellant during this incident (App. Br. 24).

The respondent first notes that the appellant has failed to offer any proof to support his claim of

newly discovered evidence. In this respect, the appellant has merely provided an unsworn letter allegedly written by Tracie. He has not provided an affidavit signed by Tracie wherein she avers that she, in fact, saw Jenkins hit the appellant on June 26, 1998. The appellant has not even offered any proof that Tracie Westfall actually wrote the letter in question. This fact alone was a sufficient basis for the trial court's refusal to entertain the motion. Davis, 698 S.W.2d at 603.

The appellant has also failed to offer any proof that the statements allegedly made by Tracie in the letter were contrary to any previous statements made by her. In this respect, the police report wherein the appellant alleges Tracie claimed that she saw Jenkins hit the appellant with his fists has been redacted and Jenkins's name does not appear (L.F. 143). Thus, there is no support for the appellant's claim that Tracie told the police she saw Jenkins do anything to him on June 26, 1998. Additionally, the appellant has failed to make Tracie's deposition a part of the record on appeal. Thus, he has again failed to offer any proof that the letter is in any way contrary to her deposition testimony.

In any event, even if the appellant had offered an affidavit from Tracie in support of his claim, it would not have been sufficient to entitle him to a new trial. At trial, the appellant asserted that he had cut Jenkins in self-defense. In support of his claim of self-defense, the appellant testified that he feared death or serious physical injury at the hands of Jenkins on February 2, 1999, due to the incident of June 26, 1998, during which Jenkins allegedly hit him in the head with a jack handle (Tr. 2:35, 96, 98-99). In rebuttal, Jenkins denied that he had hit the appellant on June 26, 1998, and testified that he had stopped another individual from hitting the appellant (Tr. 2:129-31). Tracie's letter, which stated only that she had seen the appellant get hit with a jack handle not that she had seen Jenkins hit the appellant with a jack handle, would merely have impeached Jenkins on this point and was not so material that it likely would have produced a

different result if presented at trial. Whitfield, 939 S.W.2d at 367. Thus, the appellant would not have been entitled to a new trial based on this newly discovered evidence. Id.

For these reasons, the trial court did not err in refusing to conduct a hearing on the appellant's motion alleging newly discovered evidence, and the appellant's second point on appeal must fail.

### **CONCLUSION**

In view of the foregoing, the respondent submits that the appellant's convictions and sentences for assault in the first degree, armed criminal action, assault in the third degree, and property damage in the second degree should be affirmed.

Respectfully submitted,  
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**CERTIFICATE OF COMPLIANCE AND SERVICE**

I hereby certify:

1. That the attached brief complies with the limitations contained in Supreme Court Rule 84.06(b) and contains 7,613 words, excluding the cover, this certification and the appendix, as determined by WordPerfect 9 software; and
2. That the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses and is virus-free; and

3. That a true and correct copy of the attached brief, and a floppy disk containing a copy of this brief, were mailed, postage prepaid, this 23rd day of January, 2002, to:

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